Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	**)**	
	)	
Preserving the Open Internet	**)**	GN Docket No. 09-191
	)	
Broadband Industry Practices	**)**	WC Docket No. 07-52

REPLY COMMENTS OF PAETEC HOLDING CORP.

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PAETEC Holding Corp., on behalf of its operating subsidiaries, PAETEC Communications, Inc., US LEC, and McLeodUSA Telecommunications Services, Inc. (jointly referred to as "PAETEC") files this reply addressing many of the comments filed in response to the Commission's notice of proposed rulemaking in *In the Matter of Preserving the Open Internet Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52 (rel. Oct. 22, 2009) ("*Open Internet NPRM*").

SUMMARY

PAETEC and all parties filing reply comments are doing so under the time pressure and changed circumstances created by the U.S. Court of Appeals for the D.C. Circuit's decision earlier this month in *Comcast Corp. v. FCC*. PAETEC addresses here some of the issues raised by that decision, but it expects that it may supplement this analysis in the future with an *ex parte* submission. As discussed in these reply comments, the *Comcast* decision leaves parts of the Commission's present course of action problematic and makes it more important for the Commission to address the varied jurisdictional underpinnings for the application of the proposed rules to different services and facilities. In particular, the Commission should recognize and rely on additional grounds for applying the proposed rules to broadband Internet access services provided on a wholesale basis to competitors and to enterprise customers.

PAETEC reiterates that each of the six substantive rules proposed by the Commission (Sections 8.5-8.15) should be adopted, albeit some require modification or clarification. The Commission should recognize that the transparency requirement is probably the key provision for competing service providers such as PAETEC. Making sure that competing providers know when a competitor with whom they are exchanging Internet access traffic is slowing, degrading or blocking service or particular types of traffic will minimize the need for Commission involvement in disputes over network management practices.

PAETEC agrees with those commentors who argued that the standard applied under the proposed nondiscrimination rule should be an “unjust or unreasonable discrimination” standard such as that imposed on common carriers in Section 202(a) of the Communications Act. Any other standard is unworkable and creates a potential for conflict.

PAETEC also agrees with the many commentors who stated that the proposed definition of “reasonable network management” should be amended to provide additional clarity and specificity. The rules should also put the burden of demonstrating reasonableness on the provider implementing the practice, and they should state that any network management practice will be assumed unreasonable if not disclosed by the provider to the affected parties prior to implementation. In addition, the principle purpose of the disclosed network management practice must be permissible and its effect must be proportionate to the claimed harm. Moreover, content management (i.e., copyright enforcement) should not be a permissible purpose of reasonable network management.

Finally, PAETEC agrees with the vast majority of industry and academic commentors that the Commission should not address, or apply the net neutrality rules to, managed or specialized IP-based services at this time.

TABLE OF CONTENTS

Summary 1

I.The Implementing Order Should Specifically Address the Different Bases for, and Scope of, Application of the Rules to Service Providers and Enterprise Customers 5

II. There is Widespread Consensus that the Original Four Internet Freedoms Should be Codified 6

III. Most Commentors Agree That The Commission Should Modify the Proposed Nondiscrimination Rule 9

IV. The Comments Have Demonstrated The Need for Clarification of the Reasonable Network Management Provision 11

- (a)The Commission should clarify the limited purposes for which network management practices can be employed and the procedure for determining their reasonableness 11
- (b) Content Regulation Should Not be a Part of Reasonable Network Management 14
- (c) Blocking of an IP address without notice to the affected network should be an unreasonable network management practice 16

V. The Transparency Rule Should Be Adopted and Clarified 17

VI. There is a Broad Consensus That Managed Services Should Not be Regulated .. 20

VII. The Rules Should Apply to Both Wireline and Wireless Providers 22

VIII. The Commission Has Jurisdiction to Promulgate the Rules under Titles I, II and III of the Communications Act 23

Conclusion 32

I. The Implementing Order Should Specifically Address the Different Bases for, and Scope of, Application of the Rules to Service Providers and Enterprise Customers

The *Open Internet NPRM* has generated more public comment than almost any Commission initiative in recent memory. Hundreds of industry participants and public interest groups have made filings, as have hundreds of thousands of individual members of the public. The focus of the NPRM, and as a result the focus of the vast majority of the public comments filed in the proceeding, is on the application of the proposed rules to the provision of broadband Internet access service to end user customers that are individuals, households or small businesses. Only a handful of commentors other than PAETEC addressed in their initial comments any procedural or substantive issues involving the proposed rules that related solely or even largely to the wholesale market, to service providers or to large enterprise customers.[1] In particular, none of the commentors appears to have addressed the possibility of a separate jurisdictional basis for applying the proposed rules to broadband Internet access services provided to service providers and enterprise customers.

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[1] *See* Comments of PAETEC Holdings Corp., GN Docket No. 09-191, (filed January 14, 2010) ("PAETEC Comments") at 11-28. The few other industry commentors that addressed wholesale or enterprise market issues generally focused their comments on the need for regulation of middle or last mile bottlenecks, whether through the proposed nondiscrimination rule or in an alternative proceeding. *See, e.g.,* Comments of Ad Hoc Telecom Users Committee, GN Docket No. 09-191, (filed January 14, 2010) ("Ad Hoc Comments") at 7-21; Comments of BTAmericas, Inc., GN Docket No. 09-191, (filed January 14, 2010) at 1-3; Comments of OPASTCO, GN Docket No. 09-191 (filed January 14, 2010) ("OPASTCO Comments") at 6-7. One commentor argued that the Commission should clarify that the rules should not apply to Internet access provided to competing service providers via facilities or services subject to Title II regulation. Comments of National Exchange Carriers Ass'n, Docket No. 09-191 (filed January 14, 2010) ("NECA Comments") at 10-12.

As discussed in more detail in Section VIII below, there is a clear basis in Title II of the Communications Act for applying the proposed rules to wholesale and enterprise broadband Internet access services. Particularly in light of the D.C. Circuit's decision earlier this week in the *Comcast* appeal,[2] PAETEC urges the Commission to identify and rely on this jurisdiction in its order implementing the proposed rules.

There are also substantive differences between how the rules should operate between service providers as compared to between a service provider and its end user customers. PAETEC identified some of those issues in its original comments, and in Sections III-VIII below it expands on those comments in light of issues raised by other parties.

II. There is Widespread Consensus that the Original Four Internet Freedoms Should be Codified

The great majority of the commentors – both from industry and from the consumer universe - supported the codification of the original four Internet Freedoms in §§ 8.5-8.11 of the proposed rules. Competitive wireline carriers, equipment suppliers, application providers, and small cable companies and wireless providers generally supported the codification.[3] Most large wireless carriers, incumbent wireline providers and cable MSOs

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[2] Comcast Corp. v. Federal Communications Commission, No. 08-1291 (D.C. Cir., slip op. issued April 6, 2010) (*"Comcast v. FCC").*

[3] *See, e.g.,* PAETEC Comments at 7-11; Ad Hoc Comments at 3-7; Comments of American Cable Ass'n, GN Docket No. 09-191, (filed January 14, 2010) ("ACA Comments") at 4-7; Comments of Clearwire Corp., GN Docket No. 09-191 (filed January 14, 2010) ("Clearwire Comments") at 3-8; Comments of Computer & Communications Industry Ass'n, GN Docket No. 09-191 (filed January 14, 2010) ("CCIA Comments") at 7-10; Comments of Google, Inc., GN Docket No. 09-191 (filed January 14, 2010) ("Google Comments") at 54-56;; Comments of Netflix, Inc., GN Docket No. 09-191, (filed January 14, 2010) ("Netflix Comments") at 2-4;

acknowledged the contribution of the four Internet Freedoms and claimed to support the Freedoms in their current non-binding incarnations. At least one of them even went so far as to support codification of the four Internet Freedoms,[4] although on the whole this group of commentors opposed the enactment of the new rules.[5]

The main arguments of the opponents are that the Commission has shown no demonstrated harms that are sufficient to justify regulation, and that the rules will harm consumers and investment.[6] Neither argument is convincing. The Commission should not wait until there is a flood of anticompetitive activity to regulate the behavior of large network owners. There is no denying that large network owners have both the incentive and the ability to inflict harm on consumers and competitors. There have already been a number of documented instances of such anticompetitive behavior, including the Comcast-BitTorrent and Madison River episodes and various incidents involving text message

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Comments of RNK, Inc., GN Docket No. 09-191, (filed January 14, 2010) ("RNK Comments") at 3; Comments of Sandvine Inc., GN Docket No. 09-191, (filed January 14, 2010) ("Sandvine Comments") at 24; Comments of Skype Communications S.A.R.L., GN Docket No. 09-191, (filed January 14, 2010) ("Skype Comments") at 1; Comments of Sling Media and Echostar Corp., GN Docket No. 09-191, (filed January 14, 2010) ("Sling Media/Echostar Comments") at 1; Comments of Wireless Internet Service Providers Ass'n, GN Docket No. 09-191, (filed January 14, 2010) ("WISPA Comments") at 1; Comments of XO Communications LLC, GN Docket No. 09-191, (filed January 14, 2010) ("XO Comments") at 18-23.

[4] *See, e.g.,* Comments of Qwest Communications Corp., GN Docket No. 09-191, (filed January 14, 2010) ("Qwest Comments") at 9-11.

[5] *See, e.g.,* Comments of AT&T Corp., GN Docket No. 09-191, (filed January 14, 2010) ("AT&T Comments") *passim*; Comments of Bright House Networks, GN Docket No. 09-191, (filed January 14, 2010) ("Bright House Comments") at i; Comments of Charter Communications Corp., GN Docket No. 09-191 (filed January 14, 2010) ("Charter Comments") at 4-17, 25-27; Comments of Comcast Corp., GN Docket No. 09-191, (filed January 14, 2010) ("Comcast Comments") at 4; Comments of United States Telecommunications Association., GN Docket No. 09-191 (filed January 14, 2010) ("USTA Comments") at 55-56; Comments of Alcatel-Lucent Corp., GN Docket No. 09-191, (filed January 14, 2010) ("Alcatel-Lucent Comments") at 22-27.

[6] *See, e.g.,* AT&T Comments at 93-96, 114-139; Charter Comments at 15-17; Comcast Comments at 14-21; and Verizon Comments at 31-39, 50-76.

blocking by wireless carriers. The Commission is not obligated by either law or common sense to wait until such behavior is epidemic to place limitations on the anticompetitive actions in which large network owners can engage. The risk from the substantial public interest harm that an anticompetitive practice could cause in a relatively short amount of time significantly outweighs the cost to service providers, if any, for ensuring compliance with the four Internet Freedoms that they purport to fully embrace.

As for the rules' likely economic effect, even incumbent opponents do not deny that the existence of even relatively mild net neutrality rules such as those proposed here will encourage investment in competitors' alternative networks and in other content, application and service providers ("CASPs") that operate from the edge of the network. The truth is that investment by competitors forces the incumbents to invest also. As Comcast admitted, "[o]ur wireline and wireless competitors are constantly looking to meet or beat our offerings, and we in turn are compelled to invest and innovate to remain ahead."[7] Opponents' argument that these rules will harm investment in network infrastructure focuses only on investment by the largest telcos, cable MSOs and some (but not all) of the national wireless carriers.[8] In fact, the evidence shows that the incumbents' arguments – even limited and self-serving as they are – are belied by their own large and ongoing investments in areas where various forms of net neutrality are already the rule.[9] Of course, most new non-incumbent investments in broadband are premised upon

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[7] Comcast Comments at 3.

[8] *See, e.g.,* Charter Comments at 15-17; Comcast Comments at 12-14; Verizon Comments at 40-76; *but see* Clearwire Comments at 8-10.

[9] *See, e.g.,* PAETEC Comments at 21-25.

business models that embrace net neutrality. The most recent example is the Harbinger Capital-SkyTerra transaction approved by the Commission last week.[10]

Therefore, the Commission should proceed to adopt §§ 8.5-8.11 of the proposed rules, subject to the modification to §8.11 suggested in PAETEC's original comments.[11]

III. Most Commentors Agree That The Commission Should Modify the Proposed Nondiscrimination Rule

For service providers such as PAETEC that compete with the industry behemoths, the heart of the Commission's proposal is the nondiscrimination and transparency rules in §§ 8.13 and 8.15. Without these rules, PAETEC and other competitors will remain at the mercy of the behemoths, who will be free to implement ever more sophisticated and hard to detect network management practices that disadvantage smaller competitors.

There was a surprising amount of agreement among commentors with regard to the Commission's proposal to implement a nondiscrimination rule. Industry participants supported the concept, but generally called for changes in the language of § 8.13. The key change addressed the question raised in the NPRM - whether the rule should be an absolute bar to discrimination as in the *Comcast BitTorrent Order* or an "unjust and unreasonable" standard similar to that in Section 202 of the Communications Act. PAETEC and numerous other commentors argued in their initial comments that an "unjust and

[10] Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, Memorandum Opinion and Order and Declaratory Ruling, IB Docket No. 09-184 (rel. March 26, 2010).

[11] *See, e.g.,* PAETEC Comments at 10-11.

unreasonable" standard makes more sense and is the only standard that can be defensibly coordinated with the "reasonable network management" exception.[12]

Furthermore, adopting an "unjust and unreasonable" standard will prevent the potential for application of conflicting standards to the same service, depending on the underlying facilities used to deliver the service. The reason is that proposed § 8.13 applies both to enduser customers and to CASPs, including interconnected competitive service providers. As discussed in more detail in Section VIII below, many of the facilities and services used by PAETEC and other competitors (including many rural ISPs) to provide, and by enterprise customers to obtain, broadband internet access are already regulated under Title II and thus already subject to the Section 202 standard. It would make little sense to have different standards apply to conduct depending on where in the network the blocking or discrimination was implemented. Similarly, it would make no sense to have the "unjust and unreasonable" standard apply to some enterprise customers, but to have a stricter nondiscrimination standard apply to household and small business customers.

Therefore, the language of proposed § 8.13 should be modified to provide: "Subject to reasonable network management, a provider of broadband Internet access service shall not discriminate *unjustly or unreasonably* between lawful content, applications, and services provided over or transiting its network." Because the nondiscrimination rule will be subject to an exception for reasonable network management, PAETEC is confident that it

[12] See *Open Internet NPRM* at para. 112; PAETEC Comments at 11-16; BT Americas Comments at 2; Clearwire Comments at 14-15; Comcast Comments at 42-44; Comments of National Telecommunications Cooperative Ass'n, GN Docket No. 09-191, (filed January 14, 2010) at 5-8; Sprint/Nextel Comments at 21-26; Comments of TDS Telecommunications Corp., GN Docket No. 09-191, (filed January 14, 2010) at 7; Comments of Wireless Communications Association International, Inc., GN Docket No. 09-191, (filed January 14, 2010) at 10-12; and Comments of Time Warner Cable, Inc., GN Docket No. 09-191, (filed January 14, 2010) at 53-64.

and other network operators will have the necessary freedom to manage their networks in a manner consistent with the preservation of the free and open Internet.

When combined with a strong rule providing for transparency, this nondiscrimination rule should lead to disclosure (and hopefully cessation) of most unreasonable network management practices and minimize the need for frequent Commission involvement in cases of potential violation of the net neutrality rules.

The Commission should also confirm that it is neither unjust nor unreasonable for networks to agree to network-to-network interconnection ("NNI") agreements with other providers whereby each provider commits to honor the other's MPLS QOS labels and provide equivalent QOS to its public Internet traffic, so long as the capability is made available on a nondiscriminatory basis.[13]

IV. The Comments Have Demonstrated The Need for Clarification of the Reasonable Network Management Provision

a. The Commission should clarify the limited purposes for which network management practices can be employed and the procedure for determining their reasonableness

The proposed definition of network management in § 8.3 is the practical heart of the proposed rules and, not surprisingly, it elicited a broad spectrum of comments. Nonetheless, there is widespread agreement that two major purposes of reasonable network management are (i) ensuring the proper *technical* functioning of an ISP's network (by addressing congestion in or potential harm to the network) and (ii) addressing traffic

[13] *See* PAETEC Comments at 29 and n. 32.

that is harmful to or unwanted by users. This conclusion is similar to that reached in a number of other countries that have examined the issue.[14]

These purposes are presently reflected in parts (i) and (ii) of the definition in § 8.3. The Commission must reject suggestions that the reference in (ii) to traffic that is "harmful" gives network owners license to create their own expansive definition of what constitutes a "harm."[15] Acknowledging such a right would give the large network owners a loophole through which they could drive a truck full of anticompetitive practices.

PAETEC, like other commentors, is also concerned that the language proposed by the Commission in part (b) of the definition is so vague that it leaves open the possibility that ISPs can implement their own subjectively determined "other reasonable network management practices." The resulting loophole would be equally troublesome. To prevent this possibility, part (b) should be amended to read "(b) any other reasonable network management practice that furthers a permissible interest and is narrowly tailored to serve that interest, taking into account the economic costs of alternative methods of serving that interest." The Commission's order should clarify that a "permissible interest" can only be an interest related to network management that is specifically recognized in the rule, in the

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[14] Compare Canadian Radio-television Telecommunications Commission, *Review of the Internet traffic management practices of Internet service providers*, Telecom Regulatory Policy CRTC 2009-657, File No. 8646-C12-200815400 (Oct. 21, 2009) ("*Canadian ITMP Order*"), *available at* http://crtc.gc.ca/eng/archive/2009/2009-657.htm; Working Group on Network Neutrality, Ministry of Internal Affairs and Commc'n, Japan, *Report on Network Neutrality* at 29-30 (Sept. 2007) *available at* http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/pdf/070900_1.pdf; and Japan Internet Providers Ass'n, Telecomms. Carriers Assn., Telecom Servs. Ass'n, Japan Cable and Telecomms. Ass'n, *Guideline for Packet Shaping* at 1 (May 2008) *available at* http://www.jaipa.or.jp/other/bandwidth/guidelines_e.pdf.

[15] *See, e.g.,* Sprint/Nextel Comments at 33-37.

explanatory order, or by the Commission in a prior ruling, or that has been approved by an international standards body such as the Internet Engineering Task Force.

The reasonableness inquiry should not end with the identification of a possibly permissible purpose; rather, it must also examine the reasonableness of the specific practice, its effectiveness in achieving the claimed purpose and its collateral effects. To that end, the Commission should adopt the suggestion of PAETEC and other commentors that the burden of proof on the issue of the reasonableness of a particular practice should be on the implementing provider.[16] Preferably both the rule and the explanatory order should also provide that any network management practice not fully disclosed to the affected parties, whether wholesale service providers or retail customers, is assumed to be unreasonable until demonstrated otherwise. Once an undisclosed practice is uncovered, the implementing provider should be required to cease the practice until it secures consent from affected parties or the Commission makes a finding that the particular practice is reasonable.[17] In all instances, the process for determining reasonableness should also give great weight to the actual anticompetitive effects of the practice. For example, a claim that an application or a category of traffic is being slowed or blocked for network congestion management purposes when a similar application or category of traffic using more bandwidth is not affected should be found unreasonable.[18]

The Commission should ignore the naysayers who claim that it will be overwhelmed by a cascade of cases seeking determination of the reasonableness of specific network

[16] *See, e.g.,* PAETEC Comments at 18.

[17] *See* Clearwire Comments at 9, 11-13; and Sony Electronics Comments at 7-8 (require pre-approval).

[18] *See, e.g.,* Sling Media/Echostar Comments at 3-11.

management practices. Experience has shown that once practices whose reasonableness is questionable become public, the development of an industry consensus is relatively quick and public pressure is effective in convincing service providers to rescind unjustified or unreasonable practices.

b. Content regulation should not be a part of reasonable network management

PAETEC agrees with those parties who argued that the Commission should modify the proposed definition in § 8.3 to reject copyright enforcement and other content regulation as an acceptable aspect of "reasonable network management."[19] Specifically, PAETEC urges the Commission to delete the third and fourth elements of the proposed definition of "reasonable network management." Reasonable network management should not include practices that "(iii) prevent the transfer of unlawful content; or (iv) prevent the unlawful transfer of content."[20] Neither type of practice promotes the proper technical functioning of an ISP's network or any other valid purpose of reasonable network management. Blocking, interference, or discrimination based on the content of a transmission, on its copyright status, or on the application or protocol that a speaker chooses to make the transmission, are certainly not elements of "reasonable network management," regardless of whether they may be permissible under other Commission rules.

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[19] *See, e.g.,* Ad Hoc Comments at 24-26; CDT Comments at 42-43; CCIA Comments at 20-27; EFF Comments at 10-19; Joint Comments of CCIA, CEA, EFF, Home Recording Rights Coalition and Public Knowledge, GN Docket No. 09-191, (filed January 14, 2010) at 2-8; Public Interest Groups Comments at 53-63; and WISPA Comments at 12-14.

[20] *Open Internet NPRM*, Appendix A, §8.3.

The proposed subsections (iii) and (iv) should also be rejected on practical grounds. First, as EFF pointed out, "ISPs are poorly placed to determine whether or not content is infringing or otherwise unlawful, a task generally reserved to attorneys, courts, and law enforcement."[21] Numerous commentors presented additional evidence about the inability of ISPs to make – much less to make accurately - the crucial determinations about content and use legality.[22] Additionally, enabling ISPs to police content may unintentionally expose ISPs to liability (notwithstanding Section 230 of the Digital Millenium Copyright Act (47 U.S.C. § 230)) if, in the view of a content owner, steps taken by the ISP fail to adequately police content for copyright violations.

The second practical reason that the Commission should not adopt an exception for copyright enforcement is that such an exception would effectively give large ISPs a green light to implement or expand blocking or discrimination practices that inflict collateral damage on the businesses of competitors and the lawful activities of customers. As EFF also noted, "ISPs could target particular applications, protocols, or services for discriminatory treatment, all the while asserting that they were merely targeting copyright infringement."[23] The fact is that certain ISPs are already engaging in such harmful practices. As discussed in the next section, PAETEC's experience confirms that large ISPs cannot or will not take accurately targeted steps to prevent unlawful distribution of lawful content. Their content blocking and degrading practices pose the same dangers to

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[21] EFF Comments at 11.

[22] *See* Ad Hoc Comments at 25-26; CDT Comments at 42-43; and Public Interest Groups Comments at 57-59.

[23] EFF Comments at 16.

PAETEC's and its customers' ability to compete and innovate, and to operate their businesses, as do any other practices that violate the proposed Open Internet rules.

c. Blocking of an IP address without notice to the affected network should be an unreasonable network management practice

As discussed in the preceding section, the Commission should modify its definition of reasonable network management so that § 8.3 does not allow ISPs to block or degrade transmissions on grounds that the content of the transmission is infringing or unlawful. Whether or not the Commission makes that change, it should specifically identify as an instance of unreasonable network management the blocking of an IP address without adequate notice to and consultation with the service provider to whose network the suspect IP address is registered. Such indiscriminate blocking is presently implemented most often against suspected IP addresses from which spam or infringing content allegedly originate.

As PAETEC has pointed out, even if large ISPs could correctly identify infringing content, they cannot or will not take accurately targeted steps to prevent the practice. Indeed, PAETEC detailed in its initial comments the collateral damage caused to it and its customers by certain large ISPs that respond to copyright violation allegations by using a shotgun approach to block IP addresses from which the allegedly infringing activities are originating.[24] Other commentors have provided additional examples of ongoing harm to lawful activities caused by incorrect identification of non-infringing IP addresses and

[24] PAETEC Comments at 20-21.

incorrect IP address blocking.[25] These concrete examples demonstrate that, far from being justified, an ISP practice of blocking IP addresses without adequate notice to the affected network should be identified by the Commission as an example of an unreasonable network management practice.

V. The Transparency Rule Should Be Adopted and Clarified

Section 8.15, the proposed rule requiring transparency in disclosure of prices, service parameters, and network management practices, received surprisingly broad support from all segments of the industry to complement its naturally overwhelming support from consumers. Among the industry supporters of the transparency rule were competitive carriers, service providers, equipment suppliers, application providers, smaller cable companies and both large and small wireless service providers.[26]

To date, the focus has been largely on the consumer aspects of disclosure. That focus should be expanded. The Commission's order implementing a transparency rule should address separately the scope of required disclosure (a) to competing carriers, service providers and enterprise customers, and (b) to consumers.

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[25] *See, e.g.,* Public Interest Commenters Comments at 61-62.

[26] *See, e.g.,* ACA Comments at 16-17; Comments of American Library Ass'n, GN Docket No. 09-191 (filed January 14, 2010) at 3; Bright House Comments at 10-11 ; Clearwire Comments at 11-13; DISH Networks Comments at 2, 6-9; EFF Comments at 23-25; Google Comments at 64-67; Comments of Leap Wireless, International, Inc. and Cricket Communications, Inc., GN Docket No. 09-191, (filed January 14, 2010) ("Leap Wireless Comments") at 22-25; NTCA Comments at 8-10; NATOA Comments at 7-8; Netflix Comments at 8-9; Public Interest Advocates Comments at 7; Public Interest Commenters Comments at 63-67; RNK Comments at 7-8; Rural Cellular Ass'n Comments at 7-8; Skype Comments at 3; Sling Media/Echostar Comments at 1, 11; XO Comments at 18-23.

An effective transparency rule is crucial for the ability of smaller service providers and ISPs to maintain and expand competition in the broadband Internet access market.[27] The reason is that competing carriers and service providers have both the incentive and expertise to monitor the activities of the large ISPs and to discern the potentially anti-competitive effects of their myriad of network management practices. A clear and expansive transparency rule will empower competitors to monitor large ISPs' network management activities and publicize any practices whose results are anti-competitive or anti-consumer. This approach will allow competitive service providers to supplement the Commission's enforcement resources and minimize the need for Commission action. Moreover, it is fully consistent with the recognition in the *NPRM* that "disclosure would benefit policy makers and the Internet users who rely on them by providing an empirical foundation for evaluating the effectiveness and necessity of ongoing policies."[28] Of course, this disclosure requirement should be made non-waivable; that is, large ISPs should be precluded from using their leverage to effectively force competitors to waive any right to disclosure via tariff or contract.

As Bright House Networks noted in its comments, "[n]etwork management is a routine function of network operation, and not something which any provider needs to hide."[29] The NPRM did not contain any explanation of what sort of disclosure of their network management practices broadband Internet access providers should be required to make to competing carriers and ISPs. In fact, the Commission specifically sought "comment

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[27] PAETEC Comments at 25-28.

[28] *Open Internet NPRM*, ¶ 119.

[29] Bright House Comments at 10.

on how we should interpret what information is 'reasonably required' and whether there are some standard practices that should be excluded from such mandatory disclosure."[30] PAETEC pointed out in its initial comments that there are no standard network management practices that should be excluded from such mandatory disclosure at this time. Significantly, it does not appear that other industry commentors identified, let alone justified, any specific standard network management practices that should be excluded from mandatory disclosure. Rather, other commentors echoed PAETEC's position, recognizing that as some network management practices become more standardized their disclosure may become unnecessary over time. One method to identify such standardized practices would be through cooperative industry fora. However, to the extent that the Commission endorses use of cooperative industry fora to establish such transparency rules, it must guard against the ability of large ISPs to dictate the outcome by dominating such forums. There is evidence that this happens today in other industry forums, such as those governing numbering and order processing, where large ILECs and their wireless affiliates have demonstrated an ability to impose their will over the objection of smaller competitors.

There is no persuasive argument against implementation of a transparency rule. Even the largest wireline, cable and wireless service providers that questioned the need for a rule uniformly endorsed the value of transparency in developing a competitive broadband Internet access market and maintaining a free and open Internet.[31] The counter

[30] *Open Internet NPRM*, ¶ 120.

[31] *See, e.g.,* Qwest Comments at 11-21; Sprint/Nextel Comments at 15-18; SureWest Comments at 42-45; Time Warner Cable Comments at 98-102; USTA Comments at 52-53; and Verizon Comments at 49-50, 131-134.

arguments they offered in opposition to codifying a rule of transparency are either that there is no problem to be solved[32] or that disclosure will be too burdensome or costly.[33] Neither argument is convincing or adequately quantified. The submissions of PAETEC and others demonstrate that there is an acute need for disclosure to both consumers and competitors.[34] Moreover, none of the commentors offered evidence that disclosure would unduly burden any broadband Internet access provider and few, if any, identified specific costs or amounts.[35]

VI. There is a Broad Consensus That Managed Services Should Not be Regulated

The overwhelming industry consensus, among incumbents and competitive providers, cable and telco, large and small, is that the FCC should refrain from any regulation of managed services at this time and simply monitor developments in this market sector.[36] In fact, very few industry commentors even argued that the Commission should promulgate a definition of "managed services" as part of this rulemaking. The Commission should acknowledge the industry consensus by adopting a "wait and see"

[32] *See, e.g.,* Time Warner Cable Comments at 98-99.

[33] *See, e.g.,* Leap Wireless Comments at 25; and T-Mobile Comments at 37-40.

[34] *See, e.g.,* PAETEC Comments at 25-27; CDT Comments at 31-37; and Public Interest Commenters' Comments at 63-71.

[35] *See, e.g.,* Leap Wireless Comments at 25; T-Mobile Comments at 37-40; and Time Warner Cable Comments at 98-99.

[36] *See, e.g.,* ACA Comments at 17-18; Bright House Comments at 11-15; Clearwire Comments at 13-14; Google Comments at 72-74; Sprint/Nextel Comments at 37-39; and XO Comments at 15-18.

posture for now and revisiting the possibility of managed services regulation only in light of future developments.[37]

The danger of refraining from regulating managed services at this time is the possibility that broadband Internet access providers will segment their "pipes" and fill them with a variety of managed services that will crowd out "plain vanilla" Internet access and result in degradation of standard Internet access service, both to ISPs' enduser customers and to competitors with whom they are interconnected.[38] This danger can be minimized with a broad transparency rule that gives consumers and competing service providers necessary information about the status of each broadband Internet access provider's standard Internet access service and the network management practices that affect the quality of that service. As PAETEC pointed out in its initial Comments and again in Section V above, competitors such as PAETEC have every incentive to ensure quality Internet access service across all networks with which they exchange Internet access traffic. In order to put this incentive into action, they need to know what network management practices are being used on every network with which they are exchanging Internet access traffic.

While transparency is a key in both the short and long term, the best way for the Commission to minimize the potential need for future regulation of managed services is to ensure that there is an industry-standard minimum level of service quality for broadband Internet access service. As a PAETEC and a variety of industry commentors have

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[37] *See, e.g.,* Public Interest Commenters' Comments at 32-35.

[38] See *Open Internet NPRM* ¶ 153; and Netflix Comments at 8-10.

suggested, this area could be a fertile ground for industry self-regulation. Specifically, the Commission (and/or the Federal Trade Commission) should encourage the development of voluntary industry minimum standards for (i) provision of a consumer service advertised as "broadband Internet access service" and (ii) peering and transiting of Internet access traffic.[39] Only if industry groups are unable to develop and facilitate the widespread adoption of these types of standards within a reasonable time period and it appears that this failure is resulting in widespread degradation of Internet access service should the Commission consider taking steps to identify and regulate any type of managed service.

VII. The Rules Should Apply to Both Wireline and Wireless Providers

Most industry and academic commentors addressing the issue supported the extension of the proposed rules to wireless providers.[40] However, there is widespread consensus that the application of Open Internet rules to mobile wireless networks should (i) be tempered initially in light of the capacity constraints inherent in the RAN portion of the network, and (ii) be modified over time based on experience and developments in

[39] See PAETEC Comments at 28; SureWest Comments at vi-vii; USTA Comments at 53; and Google Comments at 72-74 (suggesting any service using the public Internet or a public NAP cannot be a managed service).

[40] *See, e.g.,* PAETEC Comments at 31-33; CDT Comments at 51-52; CenturyLink Comments at 22-25; Clearwire Comments at 8-16; Free Press Comments at 121-126; Google Comments at 77-82; Leap Wireless Comments at 22-25; NATOA Comments at 11-12; Comments Of New America Foundation, Columbia Telecommunications Corporation, Consumers Union, Media Access Project, And Public Knowledge, GN Docket No. 09-191, (filed January 14, 2010) at 1-7; Comments Of Open Internet Coalition, GN Docket No. 09-191, (filed January 14, 2010) at 36-41; Public Interest Advocates Comments at 8-9; Public Interest Commentors Comments at 18-19; Skype Comments at 5-12; Sling Media/Echostar Comments at 3-12. The notable exceptions, as one would expect, were the large wireless providers (e.g. Verizon Comments *passim* and AT&T Comments at 140-182), their equipment suppliers (e.g., Qualcomm Comments at 18-26), and the "unregulated free market is king" think tanks (e.g., IPI Comments at 4-9).

wireless technology.[41] These positions are eminently reasonable and should be the bases for the Commission's application of the rules to wireless networks.

VIII. The Commission Has Jurisdiction to Promulgate the Rules under Titles I, II and III of the Communications Act

As the *Open Internet NPRM* and numerous commentors recognize, there are a variety of possible jurisdictional bases for imposition of the proposed net neutrality rules.[42] The applicability of each potential jurisdictional basis depends on the exact nature of the broadband Internet access service. Specifically, there is a clear basis in Title II of the Communications Act for applying the proposed rules to wholesale and enterprise broadband Internet access services provided by certain wireline carriers (which, for ease of reference, will be referred to as "telcos" in this section), a basis which may not currently exist in other market segments. In its implementing order in this proceeding, the Commission should address and rely on Title II as its primary jurisdictional basis for applying the proposed rules to broadband Internet access services provided by telcos to service providers and enterprise customers.

PAETEC and other competitive carriers still obtain wholesale broadband Internet access in many cases from incumbent telcos via tariffed or untariffed Title II services such as special access, Ethernet, ATM and Frame Relay.[43] Broadband Internet access for large

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[41] *See, e.g.,* CDT Comments at 51-52; Comments of Cincinnati Bell Wireless LLC, GN Docket No. 09-191 (filed January 14, 2010) at 6-7; Clearwire Comments at 9-11; Leap Wireless Comments at 9-12; Rural Cellular Ass'n Comments at 16-20; and Sprint/Nextel Comments at 26-37.

[42] *See, e.g., Open Internet NPRM* ¶¶ 83-86; and Public Interest Commenters Comments at 6-20.

[43] *See, e.g.,* Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the *Special Access NPRM*, 24 FCC Rcd 13638, 13638 (2009) ("*Special Access Framework Public Notice*") (discussing the

businesses (enterprise customers) is also mainly supplied by telcos through DS1 and DS3 special access lines and other Title II facilities.[44] The Commission and the courts have repeatedly acknowledged these facts in recent decisions.[45]

Given these facts, there is a clear basis for the Commission to impose the rules on Title II facilities and services. Moreover, even those commentors that oppose the rules concede that non-Title II telco wholesale and enterprise broadband Internet access services are provided over the same public telecommunications network facilities as other

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appropriate analytical framework for determining whether the current regulation of special access services "is ensuring conditions that are just and reasonable as required by the Act . . . "); Reply Comments of the NoChokePoints Coalition, WC Docket No. 05-25, DA 10-44 (filed February 24, 2010) ("NoChokePoints Special Access Framework Reply Comments") at 11-15 (discussing how regulated Title II DS1 and DS3 services are integral to the provision of 3G wireless broadband internet access, college and university internet access services, and wireline internet access services for business customers); NECA Comments at 10-12 (discussing applicability of proposed rules to facilities or services that are already subject to Title II regulation and used by rural ILECs/ISPs to provide Internet access services); and In the Matters of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Docket No. 06-125, Memorandum Opinion and Order (rel. October 12, 2007) ¶ 28 ("The record makes clear that rural carriers are largely using TDM-based DS1 and DS3 special access services[, which are regulated under Title II,] to access the Internet backbone today.").

[44] *See, e.g.,* Reply Comments of Ad Hoc Telecom Users Committee, WC Docket No. 05-25, DA 10-44 (filed February 24, 2010) ("Ad Hoc Special Access Framework Reply Comments") at 2-4 ("TDM DS1 and DS3 services. . . remain the primary voice and data (including internet access) links connecting American businesses with their corporate branches, with their suppliers, with their US customers, and with the rest of the world."); and NoChokePoints Special Access Framework Reply Comments at 11-15.

[45] *See, e.g., Appropriate Framework for Broadband Access to the Internet over Wireline, CC Docket Nos. 02-33, 95-20, 98-10, 01-337, WC Docket Nos. 04-242, 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) ("Wireline Broadband Order") ¶ 9, aff'd, Time Warner Telecom, Inc. v. FCC, 507 F.3d 205 (3d Cir. 2007)*; and *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d 903, 905 and n. 1 (D.C. Cir. 2009) ("Unlike *residential* customers who typically rely on their telephone or cable wires to obtain broadband Internet service, *business* customers ordinarily can obtain essential broadband services only through a dedicated high-capacity special access line owned by an ILEC such as AT&T, Verizon, or Qwest. . . . Those services include Ethernet, Frame Relay, ATM, LAN, Video Transmission, Optical Network, and Wave-Based services. . . . As a starting point, the FCC has determined that Title II pricing and common-carrier regulations largely still apply to the ILECs' special access lines, absent forbearance. ")

Title II services and as unregulated managed services and information services.[46] In addition, in both the Title II and non-Title II situations the broadband Internet access provider is providing only a transmission service; there is none of the integration of the transmission and information processing components of Internet access service that was fundamental to the Commission's consumer broadband classification decisions.[47]

In these circumstances, one option would be for the Commission to classify all wholesale broadband Internet access service provided by telcos to competing service providers and enterprise customers under Title II.[48] If the Commission chose not to do so in this proceeding, it could rely instead on its ancillary jurisdiction under Title I to impose the proposed rules on those non-Title II facilities operated by, and broadband Internet access services offered by, telco broadband Internet access providers to competing service

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[46] *See, e.g.,* AT&T Comments at 17-27. Competitive carriers, too, offer Title II and non-Title II services over the same network infrastructure. *See, e.g.,* XO Comments at 17.

[47] *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Order"), aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *Wireline Broadband Order*, ¶¶ 32–76; and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901 (2007).

[48] While some contend that the Commission only classifies facilities and not services as being subject to Title II, the Commission only last week again acknowledged that specific services can be subject to Title II regulation, regardless of the classification of the physical facility over which they are transmitted. *See* In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Order on Reconsideration And Second Further Notice Of Proposed Rulemaking* (rel. April 21, 2010) ("*Mobile Roaming FNPRM*") ¶ 65 ("Although the Commission determined three years ago that wireless broadband Internet access is an information service and not a CMRS service, it has not made any classification determinations regarding any service or application provided over these Internet access connections. Further, the Commission has not determined whether the provision of automatic roaming should be considered a telecommunications service, and thus subject to Title II, even if the subscriber is using the roaming arrangement to access an information service."(Footnote omitted.)).

providers and enterprise customers. Nothing in the D.C. Circuit's recent *Comcast* decision precludes exercise of ancillary jurisdiction in these circumstances.

The Commission may exercise ancillary jurisdiction when two conditions are satisfied: "(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[49] Any assertion of ancillary jurisdiction over non-Title II telco facilities providing broadband Internet access to carriers and enterprise customers would meet both requirements. The Commission's general jurisdictional grant under Title I inarguably covers the regulated subject,[50] and this exercise of ancillary authority is necessary to ensure that the Commission can effectively implement and enforce several of its statutory mandates. Two particular mandates that justify use of ancillary jurisdiction are contained in Sections 202 and 256. The Commission has a duty under Section 202(a) to prevent unjust or unreasonable discrimination in facilities and services offered by carriers.[51] That is the very purpose of the proposed rules.

Additionally, the Commission is required under Section 256(a) "to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to provide telecommunications service through . . . public telecommunications network interconnectivity and interconnectivity of devices with such networks used to provide telecommunications service; and . . . to ensure the ability of users and information providers to seamlessly and transparently transmit and receive

[49] *See Open Internet NPRM* ¶ 133; accord, *Comcast v. FCC* at 7.

[50] See *id.* at 8.

[51] 47 U.S.C. § 202(a).

information between and across telecommunications networks."[52] Under Section 256 (b) and (d), the Commission is required to "establish procedures for . . . oversight of coordinated network planning by telecommunications carriers and other providers of telecommunications service for the effective and efficient interconnection of public telecommunications networks" and to ensure that "public telecommunications network connectivity" is provided "without degeneration."[53] The specific mandates of Section 256, like the more aspirational policies in Section 254, apply to both telecommunications and information services, and require the Commission to ensure access by both users and information services providers to ensure unimpeded transmittal and delivery of information across networks.[54]

Exercising ancillary jurisdiction would be consistent with the Supreme Court precedent. In *United States v. Southwestern Cable Co.*, the Supreme Court accepted the Commission's argument that restricting the geographic reach of cable television was

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[52] 47 U.S.C. § 256(a).

[53] 47 U.S.C. § 256(b)(1) and 256(d). While the D.C. Circuit rejected Section 256 as a basis for ancillary jurisdiction over Comcast's network management practices *aimed at its own consumer subscribers* (*Comcast v. FCC,* slip op. at 32), nothing in the court's analysis of Section 256 would preclude the Commission from using it as the basis for an exercise of Title I jurisdiction over aspects of public telecommunications networks' interconnection obligations to each other. Moreover, even the *Comcast v. FCC* court recognized that each assertion of ancillary jurisdiction must be justified independently by the Commission, and considered by a reviewing court on the specific facts. Slip op. at 12-16.

[54] For example, AT&T claims that the policy statements of Section 254 are mandatory and can override the language in Section 254(c)(1) that limits USF to the funding of telecommunications services. *See* Letter from Gary L. Phillips of AT&T Corp. to Marlene Dortch, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (filed April 12, 2010) and Attachment to Letter from Gary L. Phillips to Marlene Dortch, GN Docket Nos. 09-51, 09-47, 09-137, WC Docket Nos. 05-337, 03-109 (filed Jan. 29, 2010). If AT&T is correct that the overriding purpose of Section 254 expands the Commission's authority to provide USF funding for broadband services, then certainly the more specific mandates of Section 256 similarly expand its authority to require interconnection for the exchange of information services traffic.

necessary to fulfill its Title III responsibility to foster local broadcast service.[55] The Court concluded that "the Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems."[56] The Court also "emphasize[d] that the authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[57]

Just as the geographic limitation at issue in *Southwestern Cable* was reasonably ancillary to the effective regulation of television broadcasting, so too the application of the proposed net neutrality rules to non-Title II telco facilities and services is necessary for the Commission's effective regulation of Title II facilities. In most cases, the Title II facilities at issue are used to access private or public peering points or points of presence, where the Internet access traffic is handed off and carried further on non-Title II facilities. Open Internet rules that apply only to Title II facilities could be easily circumvented. For example, a telco could avoid the effect of Title II Open Internet rules by combining traffic from Title II and non-Title II facilities at a network access point, exchanging it with another telco, then exchanging it back. Each telco would then be free to implement whatever network management practices or traffic shaping, blocking or degrading rules it wished on the returned traffic, as long as it was carried on non-Title II facilities. This would be the Open Internet equivalent of the jurisdictional arbitrage that now occurs as service

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[55] 392 U.S. 157 (1968); *see also United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest Video I*), and *FCC v. Midwest Video Corp.*, 40 U.S. 689 (1979) (*Midwest Video II*).

[56] 392 U.S. at 177.

[57] *Id.* at 178.

providers camouflage the origination point of traffic in order to take advantage of lower termination rates. Unless Open Internet regulations are applied as well to non-Title II facilities – specifically including facilities used to transmit all traffic exchanged at public and private Internet access points - telcos will be able to eviscerate the effectiveness of any Open Internet rules.

Due to the historical regulatory silos embedded in the Communications Act, wholesale broadband Internet access services provided by cable MSOs and wireless carriers are not classified under Title II. In fact, except in limited circumstances where cable MSOs may have chosen to tariff transmission services on a common carrier basis, there is presently no clear classification for those services or providers.[58] Nonetheless, it is not disputed that the cable MSOs' wholesale broadband Internet access services interconnect with, are provided over the same types of public telecommunications network facilities (fiber, coax or microwave) as, and use the same Internet protocols as the telco broadband Internet access services. While wireless carriers' offerings in this space are nascent, the use of microwave backhaul for Internet access is growing and the service interconnects and competes with telco and cable wholesale broadband Internet access services.

It makes little sense for these cable and wireless facilities and services to be classified under Title II when offered by telcos but not classified under Title II when provided by MSOs or wireless carriers. Therefore, the Commission should conclude, as it already has with regard to residential broadband Internet access service, "that services

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[58] The cable modem and wireless classification orders only addressed the status of broadband Internet access provided to retail consumers. *Cable Modem Order* ¶ 31.

offering the same essential functions to . . . customers should not be regulated under different statutory frameworks simply because of the wire used."[59] One option would be for the Commission to classify (or reclassify) wholesale broadband Internet access provided by MSOs and wireless carriers to competing service providers and enterprise customers under Title II.[60] A second option, as with the telcos' facilities discussed above, is for the Commission to rely instead on its ancillary jurisdiction under Title I to apply the rules to MSOs' and wireless carriers' broadband service offerings.[61] The same rationale that justifies application of Open Internet rules to non-Title II telco facilities and services applies with equal force to application of the rules to wholesale cable and wireless providers. An Open Internet rule that applies only to telco facilities could be easily circumvented. For example, a telco could simply "trade" traffic at a network access point with a cable MSO or wireless carrier, then take it right back. Having "washed" the traffic of its telco origin, the telco could implement whatever network management practices or traffic shaping, blocking or degrading rules it wished.

Such an exercise of ancillary jurisdiction is not precluded by the judicial precedent. The Supreme Court recognized in its *Brand X* decision, and even the *Comcast* court acknowledged, that '"the Commission remains free to impose special regulatory duties on

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[59] *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F.3d at 905.

[60] The Commission only a few days ago asked for comment on the related issue of whether "automatic roaming for non-interconnected services is itself a telecommunications service, and therefore is also subject to our authority under Title II." *See Mobile Roaming FNPRM* ¶ 68.

[61] Again, the Commission is already considering, as part of the *Mobile Roaming FNPRM,* the related issue of the scope of its "ancillary authority to address roaming obligations for providers of non-interconnected wireless services." *Id.* ¶¶ 69-71.

[cable Internet providers] under its Title I ancillary jurisdiction."'[62] In fact, the Supreme Court suggested that the Commission's jurisdiction goes far beyond the limited exercise of ancillary power suggested here by indicating that "the Commission could likely 'require cable companies to allow independent ISPs access to their facilities' pursuant to its ancillary authority. . . "[63] To regulate wholesale broadband Internet access services provided by wireless carriers, the Commission could base jurisdiction directly on Title III of the Communications Act or invoke its ancillary jurisdiction based on the need to enforce its various statutory mandates in Title III.[64] Indeed, the Commission has already relied directly on its authority under Section 303(r) to impose "open platform" obligations on Upper 700 MHz C Block licensees, without regard to whether such licensees were providing telecommunications or information services.[65]

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[62] *Comcast v. FCC,* slip op. at 32, quoting *Brand X*, 545 U.S. at 996.

[63] *Brand X*, 545 U.S. at 1002 (quoted in *Comcast v. FCC*, slip op. at 13).

[64] *See, e.g.*, Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, 16352–53, ¶ 27 (1999). With respect to Internet access provided via spectrum-based facilities, the Commission has additional authority pursuant to Title III of the Communications Act. See *Open Internet NPRM* ¶ 86 and *Mobile Roaming FNPRM* ¶¶ 65-67.

[65] Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services, WT Docket 03-264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules, WT Docket No. 06-169, Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, PS Docket No. 06-229, Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, WT Docket No. 96-86, Declaratory Ruling on Reporting Requirement under Commission's Part 1 Anti-Collusion Rule, WT Docket No. 07-166, *Second Report and Order*, 22 FCC Rcd 15289, 15365 ¶ 207 (2007) ("*700 MHz Second Report and Order*"). *See also* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Report and Order*, 11 FCC Rcd 18455, 18459 ¶ 7, 188471-72 ¶ 31 (relying on Title III authority to impose resale obligations on non-Title II services);

By treating all of these similar facilities and services similarly, the Commission would be implementing the principle of technological neutrality that it and Congress have acknowledged as a principal component of its statutory mandate.[66] Because these services are provided over the same types of facilities (fiber, coax or microwave) and using the same Internet protocols as the telco wholesale broadband Internet access services, it would be unfair not to apply the same rules to them. On the other hand, by failing to apply regulations across the board, the Commission would be violating technological neutrality and effectively pick winners and losers. Whether based on the provisions cited above or other provisions of the Communications Act, applying the net neutrality rules to these services would be well within the Commission's Title I ancillary jurisdiction.

This proposed "unbundling" of the Commission's jurisdictional analysis seems prudent in light of the recent *Comcast* decision. This approach will maximize the likelihood that at least some version of the proposed net neutrality rules will be put in place and remain in effect throughout the short and medium term. The reality is that whatever rules are enacted through this proceeding will be subject to challenge(s) in federal court(s). In addition, the *Comcast* decision seems to preclude the Commission's use of ancillary jurisdiction under Title I to implement net neutrality rules that apply to broadband

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Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Memorandum Opinion and Order on Reconsideration*, FCC 99-250, ¶ 27 (1999) (expressly rejecting "[a]rguments that the scope of the resale rule is overbroad because it extends to non-Title II services," reaffirming that Title III provided a basis for imposing the rule).

[66] *See, e.g.,* In The Matter Of Section 68.4(A) Of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, RM-8658 (rel. August 14, 2003) ¶ 76 ("In addition, the Commission is committed to the principle of technological neutrality in its regulatory requirements. For this reason, we impose the requirements across all transmission technologies.").

Internet access services provided to residential customers.[67] Thus, the unbundled jurisdictional analysis proposed here should be viewed as a stopgap measure. Even if net neutrality rules governing broadband Internet access services for consumers are delayed by reclassification issues or are challenged on appeal, the wholesale rules would not be subject to the same jurisdictional attacks and would likely remain in place as a backstop. While this situation is not ideal, it is better than potentially having no net neutrality rules at all in place for years.

There are significant benefits to having even such limited net neutrality rules in place. The first benefit, of course, is the protection afforded both to enterprise users and to the other customers of competitors such as PAETEC. PAETEC (like the great majority of competitive service providers) already follows the Four Internet Freedoms and its customers enjoy an Open Internet experience throughout PAETEC's network. PAETEC, however, has no control over - and at least as to the larger ISPs, little knowledge of - the traffic management practices of ISPs with whom it exchanges traffic. Imposition of Open Internet rules at the wholesale level will guarantee the customers of PAETEC and its brethren a seamless and open Internet experience regardless of where their Internet access takes them. There will also be indirect benefits even to the residential customers of ISPs that choose not to offer their own customers an Open Internet experience. It will be difficult for these large ISPs to manipulate their own residential customers' traffic without also affecting wholesale and enterprise traffic. Thus, so long as all ISPs have transparency and nondiscrimination obligations with regard to Internet transit traffic and certain

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[67] *Comcast v. FCC*, slip op. at 16-32.

enterprise Internet traffic, there will be a spillover effect that limits the potential harm to residential customers of non-complying ISPs.

Another substantial benefit of wholesale net neutrality rules is the impetus they will provide for increased network investment by PAETEC and other CLECs, smaller ISPs and other competitors. Such investment is crucial to achieving the goals of the Commission's broadband plan. A more amorphous, but equally important, value of even limited net neutrality rules is the beneficial impact of the rules on innovation not just by these competitors, but also by a wide variety of other CASPs.

PAETEC also urges the Commission to reclassify the transmission components of residential DSL, cable modem and wireless broadband Internet access as Title II services and apply the rules to such consumer services on that basis. Justifying the decision to do so would not be difficult, although procedural prudence might suggest that the Commission issue a further NPRM on the reclassification option in this proceeding. Indeed, the Supreme Court in the *Brand X* case recognized the possibility of the Commission changing its position on the transmission classification issue.[68] As numerous commentors in this proceeding and the *Broadband Plan Proceeding* have demonstrated, the factual assumptions used to justify the deregulatory broadband classification decisions have proven to be incorrect over time.[69] PAETEC will not repeat those arguments here, but it

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[68] *See NCTA v. Brand X*, 545 U.S. at 1001.

[69] "The Commission based its decision to classify broadband as an information service on several factors: the level of integration of the transmission and information processing components, the expectation that new facilities based competitors would emerge, and the conclusion that the Commission retained adequate authority under Title I to protect consumers and otherwise safeguard the development of the Internet. Events demonstrate that all three of these assumptions warrant reevaluation." Reply Comments of Public Knowledge, et al. in *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (filed January 26, 2010)

does believe that a well-reasoned decision by the Commission reversing its consumer broadband classification decisions would fit easily within the case law governing an agency's reconsideration of its previous decisions,[70] and would survive judicial review. Such a reclassification should not lead, however, to the imposition of the full panoply of Title II regulation. Rather, the Commission should use its inherent forbearance authority under Section 10 to craft from the outset a light regulatory regime for broadband Internet access services.[71]

<u>Conclusion</u>

The Commission should not be deterred by the outcome of the *Comcast* case from taking the steps necessary to keep the Internet open. The filed comments confirm that the proposed rules benefit the country by clarifying and strengthening the obligations of broadband Internet access providers and the rights of their customers and competitors. The proposed rules should be

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at 2. *See also* CDT Comments at 17-22; Comments of Public Knowledge, et al. in *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (filed June 8, 2009), at 24-25; and Comments of the Consumer Federation of America and Consumers Union in *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (filed June 6, 2009), at 17-20.

[70] "[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-11 (2009) (emphasis in original).

[71] The Commission has jurisdiction to act *sua sponte* to forbear from regulation even when no petition has been filed by a carrier. *See, e.g., Cable Modem Order* ¶94 (initiating forbearance inquiry *sua sponte)*; *Wireline Broadband Order* ¶¶91-95 (forbearing *sua sponte* from Section 203-205 tariff requirements on certain carriers); and Policy and Rules Concerning the Interstate, Interexchange Marketplace and Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Report and Order* (rel. Aug. 7, 1996) ¶21 (conducting a *sua sponte* forbearance analysis to determine whether it should permit IXCs to depart from geographic rate averaging where it had permitted them to do so under pre-1996 Act policy). Any such forbearance analysis should specifically address all relevant Title II obligations, so as to preclude a barrage of forbearance petitions by large ISPs immediately after an order is issued in this proceeding.

adopted (subject to being amended as suggested above) and applied to all providers of broadband Internet access service.

Respectfully submitted,

_________/s/_______________

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of April, 2010, a true and correct copy of the foregoing Reply Comments of PAETEC Holding Corp. was served electronically on the following:

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